

28 April 2021

SENATOR GRACE L. POE
Chairperson
Committee on Public Services
Senate of the Philippines
Pasay City

Dear **Senator Poe**:

We are pleased to submit the Department's position on the proposed legislation, entitled:

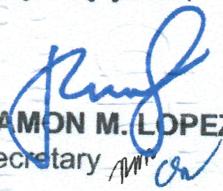
Senate Bill No. 2094

"An Act Amending Commonwealth Act No. 146, Otherwise Known as the Public Service Act, as Amended"

This is without prejudice to the Department's submission of additional inputs.

With my best regards.

Very truly yours,


RAMON M. LOPEZ
Secretary



OFFICE OF THE SECRETARY

DTI Position on

Senate Bill No. 2094¹

“An Act Amending Commonwealth Act No. 146, Otherwise Known as the Public Service Act, as Amended”

The Department recognizes the intent of the proposed legislation seeking to delineate the definition of ‘public utility’ from ‘public service’, amending for that purpose Commonwealth Act (CA) No. 146, otherwise known as the Public Service Act. It should be noted that since the Act’s passage in 1936, ‘public utility’ and ‘public service’ are interpreted to be one and the same and are thus used interchangeably. Because of this interpretation, various sectors and services in the country are subjected to restrictions under the Constitution, and has barred the entry of foreign direct investments (FDI) into these sectors. We view, therefore, that the passage of a law that will clarify the rightful delineation between public service and public utility will put an end to the ambiguous interpretation of public service. Hence, investments shall be facilitated and competition increased, redounding to quality service delivery for the benefit of the Filipinos in general and consumers in particular.

Given the rapid innovation and technological advancements that have modified the delivery of public service from more than 80 years ago, it is crucial for the country to be able to facilitate a policy environment that will encourage the adoption of the most advanced technologies in critical services sectors from which industries depend upon for increased productivity. In addition, the DTI sees that the entry of more players in the local market will benefit consumers who exercise the right to choose between competing service providers.

The proposed legislation is seen to improve the country’s investment attractiveness as the FDI Restrictiveness index developed by the Organisation for Economic Co-operation and Development (OECD)² reveals that while the Philippines has significantly liberalized from an index score of 0.501 in 1997 down to 0.374 in 2019, it has the most restrictive regime among the ASEAN member states (*See Annex A*). The amendments to CA No. 146 may facilitate investments into the country, given that the Philippines only received 4.8% of total net FDI inflows into the ASEAN in 2019 (*See Annex B*).

Allowing for investments in a wider set of services, including telecommunications and transportation, may also improve the country’s rankings in the Network Readiness Index (74th out of 134 economies),³ Global Innovation Index (50th out of

¹ In Substitution of Senate Bill Nos. 13, 318, 419, 531, 1257, and 1372 taking into consideration House Bill No. 78

² This considers foreign equity, key personnel, and operation personnel restrictions; and screening and approval measures, ranges from zero (0) to one (1) with a higher score indicating a more restrictive regime.

³ Portulans Institute: The Network Readiness Index 2020, accessed at https://networkreadinessindex.org/wp-content/uploads/2020/11/NRI-2020-V8_28-11-2020.pdf

131 economies),⁴ World Digital Competitiveness (57th out of 63 economies),⁵ Logistics Performance Index (60th out of 160 economies),⁶ and World Competitiveness (45th out of 63 economies),⁷ Numbeo's Traffic Index (12th worst out of 85 economies)⁸, among others. Thus, upholding a conducive business environment that is set to benefit the productive sectors of the economy as well as beginning entrepreneurs and micro, small, and medium enterprises (MSMEs).

Allowing greater foreign ownership is expected to complement the various initiatives of the government by injecting new capital, bringing state-of-the-art technologies, and increasing competition. Government programs such as the Public Utility Vehicle Modernization Program (PUVMP) and the Build, Build, Build Program, which includes New Normal Projects as approved by the National Economic and Development Authority (NEDA) Infrastructure Committee with 70 projects under transport and mobility and 10 in information and communications technology (ICT), stand to benefit from the proposed legislation.⁹

This may also address concerns surrounding the telecommunications industry, such as having a low tower density with only 22,834 cellular towers/sites,¹⁰ with 45.5% belonging to Globe Telecom, 44.1% to Smart Communications, and the remaining 10.4% to DITO Telecommunity.¹¹ The subscriber-to-tower ratio of the country at 5,400 to 1, is way beyond the recommendation of the International Telecommunications Union (ITU) at only 2,000 subscribers per tower, which necessitates the establishment of 50,000 towers/sites for the country to be able to comply.

The urgency of removing barriers to foreign entry has been highlighted by the COVID-19 pandemic, resulting in a surge in demand for internet connectivity due to remote working and blended learning arrangements and an increasing need to modernize the transportation sector to include cashless payment transactions and electronic toll collections.

In view of the above, the Department would like to submit its comments, suggestions, and recommendations on some of the provisions of the bills, as follows:

⁴ WIPO: Global Innovation Index 2020, accessed at

https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf

⁵ IMD: World Digital Competitiveness Ranking 2020, accessed at <https://www.imd.org/wcc/world-competitiveness-center-rankings/world-digital-competitiveness-rankings-2020/#:~:text=The%20IMD%20World%20Digital%20Competitiveness,business%2C%20government%20and%20wider%20society>

⁶ World Bank: Logistics Performance Index Global Rankings 2018, accessed at <https://lpi.worldbank.org/international/global>

⁷ IMD: World Competitiveness Ranking 2020, accessed at <https://www.imd.org/wcc/world-competitiveness-center-rankings/world-competitiveness-ranking-2020/>

⁸ Numbeo: Traffic Index Country Ranking 2021, accessed at https://www.numbeo.com/traffic/rankings_by_country.jsp

⁹ NEDA list as of 19 August 2020, accessed at <https://www.neda.gov.ph/29336-2/>

¹⁰ Data from the DICT Legal Affairs Division as of 11 February 2021

¹¹ DICT: 1500 Permits for Building Towers Approved, DICT Expects Faster Roll Out of Cell Towers with LGUs Support, accessed at <https://dict.gov.ph/1500-permits-for-building-towers-approved-dict-expects-faster-roll-out-of-cell-towers-with-lgus-support/>

Provision in SB No. 2094	Department's Comments/ Recommendations/ Suggestions
<p>“Sec. 3. <i>Transfer of Jurisdiction to Various Administrative Agencies.</i> – The powers of the Public Service Commission under Commonwealth Act No. 146, or the Public Service Law, as amended, are hereby transferred to the various administrative agencies of government according to their respective jurisdictions, including but not limited to the following:</p> <ol style="list-style-type: none"> a. Civil Aeronautics Board (CAB); b. Civil Aviation Authority of the Philippines (CAAP); c. Department of Energy (DOE); d. Department of Environment and Natural Resources (DENR); e. Department of Information and Communications Technology (DICT); f. Department of Transportation (DOTr); g. Energy Regulatory Commission (ERC); h. Land Transportation Franchising and Regulatory Board (LTFRB); i. Land Transportation Office (LTO); j. Local Water Utilities Administration (LWUA); k. Maritime Industry Authority (MARINA); l. Metropolitan Waterworks and Sewerage System (MWSS); m. National Telecommunications Commission (NTC); n. National Water Resources Board (NWRB); o. Philippine Coast Guard (PCG); p. Philippine Ports Authority (PPA); and q. Toll Regulatory Board (TRB).” 	<ul style="list-style-type: none"> • The Department supports the proposed transfer of powers to 18 administrative agencies since the Public Service Commission has long been non-existent. These concerned offices and agencies have the competence and expertise to regulate the sectors and activities within their jurisdiction. However, we recommend that each agency's area of concern be indicated to avoid overlapping functions and jurisdictions amongst these identified agencies.
<p>“Sec. 2. <i>Definition of Terms.</i> – For the purposes of this Act, the terms below shall be defined as follows:</p> <ol style="list-style-type: none"> a.) XXX b.) XXX c.) Critical infrastructure — refers to systems and assets, whether physical or virtual, so vital to the 	<ul style="list-style-type: none"> • The Department supports the move to provide a law that would delineate public utility from public service. This is to remove the ambiguity in the interpretation being used where public service is used interchangeably with public utility. The Supreme Court

<p>Republic of the Philippines that the incapacity or destruction of such systems or assets would have a debilitating impact on national security. It shall specifically refer to:</p> <ul style="list-style-type: none"> (i) Transmission of Electricity; (ii) Distribution of Electricity; (iii) Water Pipeline Distribution Systems and Sewerage Pipeline Systems; (iv) Telecommunications; and (v) Common Carrier <p>XXX”</p> <p>“Sec. 4. A new Section 13 (d) of Commonwealth Act No. 146, as amended, is hereby inserted to read as follows:</p> <p>‘(D) PUBLIC UTILITY. – PUBLIC UTILITY REFERS TO A PERSON THAT OPERATES, MANAGES AND CONTROLS FOR PUBLIC USE ANY OF THE FOLLOWING:</p> <ul style="list-style-type: none"> 1) DISTRIBUTION OF ELECTRICITY; 2) TRANSMISSION OF ELECTRICITY; AND 3) WATER PIPELINE DISTRIBUTION SYSTEMS AND SEWERAGE PIPELINE SYSTEMS <p>NO OTHER PERSON SHALL BE DEEMED A PUBLIC UTILITY UNLESS OTHERWISE SUBSEQUENTLY PROVIDED BY LAW.</p> <p>THE NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY (NEDA) THROUGH ITS BOARD, IN CONSULTATION WITH THE PHILIPPINE COMPETITION COMMISSION (PCC) AND THE CONCERNED ADMINISTRATIVE AGENCIES, MAY RECOMMEND TO CONGRESS THE</p>	<p>pronouncements on cases of JG Summit Holdings, Inc. vs. Court of Appeals, Committee on Privatization, its Chairman and Members; Asset Privatization Trust and Philyards Holdings, Inc. provide us a picture of the supposed delineation between ‘public utility’ and ‘public service’ (see Annex C).</p> <ul style="list-style-type: none"> • Taking note of the above, as well as the present intention to liberalize the critical infrastructure sectors, the DTI proposes a new public utility definition, to wit: <p><i>The term ‘Public Utility’ refers to the business, operation or service through a good, commodity or service that is of public consequence and is a natural monopoly.</i></p> <p><i>The National Economic and Development Authority (NEDA), in consultation with the Philippine Competition Commission (PCC), shall be authorized by Congress to determine whether a business or service be deemed a public utility on the basis of the following criteria:</i></p> <ul style="list-style-type: none"> <i>(1) The business, operation or service is of public consequence;</i> <i>(2) The good, commodity or service is necessary to the public that needs to be regulated when the common good so requires and is a natural monopoly;</i> <i>(3) The good, commodity or service is necessary for the maintenance of life and occupation of residents; and,</i> <i>(4) The good, commodity or service is obligated to</i>
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<p>CLASSIFICATION OF A PUBLIC SERVICE AS A PUBLIC UTILITY ON THE BASIS OF THE FOLLOWING CRITERIA:</p> <ol style="list-style-type: none"> 1) THE PERSON OR JURIDICAL ENTITY REGULARLY SUPPLIES AND DIRECTLY TRANSMITS AND DISTRIBUTES TO THE PUBLIC THROUGH A NETWORK A COMMODITY OR SERVICE OF PUBLIC CONSEQUENCE; 2) THE COMMODITY OR SERVICE IS A NATURAL MONOPOLY THAT NEEDS TO BE REGULATED WHEN THE COMMON GOOD SO REQUIRES; 3) THE COMMODITY OR SERVICE IS NECESSARY FOR THE MAINTENANCE OF LIFE AND OCCUPATION OF THE PUBLIC; AND 4) THE COMMODITY OR SERVICE IS OBLIGATED TO PROVIDE ADEQUATE SERVICE TO THE PUBLIC ON DEMAND' <p>UNLESS OTHERWISE INCLUDED IN THE DEFINITION OF PUBLIC UTILITY UNDER THIS ACT, PERSONS CLASSIFIED AS PUBLIC UTILITIES UNDER COMMONWEALTH ACT NO. 146 ARE HEREBY CONSIDERED AS PUBLIC SERVICE WHICH SHALL CONTINUE TO BE SUBJECT TO REGULATION BY RELEVANT ADMINISTRATIVE AGENCIES UNDER EXISTING LAWS."</p>	<p><i>provide adequate service to the public on demand.</i></p> <ul style="list-style-type: none"> • As a matter of policy, the DTI recognizes the need to specify the Distribution and Transmission of Electricity, and Water Pipeline Distribution System or Sewerage Pipeline as public utilities, nevertheless, we suggest that the characteristics of a public utility be elucidated instead to make the classification system more efficient. • Further, we note that the definition provided for 'critical infrastructure' and 'public utility' are overlapping in scope as they both include transmission and distribution of electricity and water pipeline distribution systems and sewerage pipeline systems, which may affect the clarity of provisions given their interchangeability. • We strongly support the proposal that the NEDA, in consultation with the PCC, be authorized to draw a list of exemptions akin to the Foreign Investment Negative List, as proposed by the legislation. • Further, we propose the inclusion of a provision on the non-impairment of existing agreements to provide stability and prevent investor uncertainty by providing for a basic law that guarantees due process and freedom from discrimination even in the area of contracting. The following provision is proposed: "SEC. XX. <i>Non-Impairment of Existing Agreements.</i> – The application and implementation of the pertinent provision of this Act shall not impair vested rights or obligations of contracts. Current
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	<p>and subsisting concession agreements and other similar contracts of juridical persons with government agencies or government-owned and-controlled corporations covering activities hereunder classified as public utilities shall remain valid and in force in accordance with the existing terms and conditions the parties agreed to thereunder until the expiration or termination thereof.”</p>
<p>“Sec. 6. Section 16 (a) and (c) of Commonwealth Act No. 146, as amended are hereby amended to read as follows:</p> <p>Section 16. <i>Proceeds of the</i> [Commission] ADMINISTRATIVE AGENCY Upon Notice of Hearing. – The [Commission] ADMINISTRATIVE AGENCY shall have THE power upon proper notice and hearing in accordance with the rules and provisions of this Act, [subject to the limitations and exceptions mentioned and saving provisions to the contrary]:</p> <p>‘(a) XXX</p> <p>(b) XXX</p> <p>(c) To fix and determine THE MAXIMUM individual or joint rates, tolls, charges, classifications, REVENUES or schedules thereof, as well as commutation, mileage, kilometrage, and other special rates which shall be imposed, observed, and followed thereafter by any public service WHEN THE PUBLIC INTEREST SO REQUIRES: Provided, That the [Commission] ADMINISTRATIVE AGENCY may in its discretion, approve rates proposed by public services provisionally and without necessity of any hearing, but it shall call a hearing thereon within [thirty] FIFTEEN (15) days, thereafter, upon publication and notice to the [concerns operating] AFFECTED</p>	<ul style="list-style-type: none"> • The Department agrees with the proposal to let the concerned administrative agency, with the public interest in mind, to establish and enforce a methodology for setting rates based on reasonable costs and reasonable rate of return. This would give the administrative agency the flexibility in imposing a justifiable formula that balances out public interest with the real cost of operating the concerned facilities. • In conjunction with this, the Department also agrees with the provision mandating the PCC to conduct regular studies on whether deregulation is warranted in a sector. We recommend that the PCC findings be used as basis for setting up reasonable rates in public utilities.

<p>PARTIES in the territory affected, TO RATIFY ITS PRIOR PROVISIONAL APPROVAL OR CHANGE, MODIFY OR ALTER THE APPROVED RATE BASED ON PUBLIC INTEREST:</p> <p>Provided, further, That in case the public service equipment of an operator is used principally or secondarily for the promotion of a private business, the net profits of said private business shall be considered in relation with the public service of such operator for the purpose of fixing the rates. IN THE INTEREST OF THE PUBLIC, THE ADMINISTRATIVE AGENCY MAY ESTABLISH AND A METHODOLOGY FOR SETTING RATES, TAKING INTO ACCOUNT ALL RELEVANT CONSIDERATIONS, INCLUDING THE EFFICIENCY OF THE REGULATED PUBLIC SERVICE. THE RATES MUST BE SUCH AS TO ALLOW THE RECOVERY OF THE PRUDENT AND EFFICIENT COSTS AND A REASONABLE RATE OF RETURN. INCOME TAX SHALL BE ALLOWED AS A CASH EXPENDITURE OR OUTFLOW FOR RATE-DETERMINATION PURPOSES. THIS PROVISION SHALL NOT BAR THE APPLICATION OF PERFORMANCE-BASED RATE REGULATION SHOULD THE ADMINISTRATIVE AGENCY REGULATING SUCH PUBLIC SERVICE DEEM IT EFFICIENT AND IN THE PUBLIC INTEREST."</p>	
<p>"Sec. 10. Section 23 of Commonwealth Act No. 146, as amended, is hereby 6 amended to read as follows:</p> <p>'Any public service corporation that shall perform, commit, or do any act or thing forbidden or prohibited or shall neglect, fail or omit to do or perform any act or thing herein to be done or performed, shall be punished by a fine not exceeding [twenty-five thousand pesos] TWO MILLION PESOS (P2,000,000.00), or</p>	<ul style="list-style-type: none"> • The DTI agrees with the proposal to update the applicable penalties and fees for the commission of any act forbidden or prohibited under this Act as a way to discourage the commission of such acts and to make the applicable fees adjusted to inflation.

imprisonment ~~[not exceeding five years]~~
**OF NOT LOWER THAN SIX (6) YEARS
AND NOT HIGHER THAN TWELVE (12)
YEARS**, or both, in the discretion of the
court.”

“Sec. 11. Section 24 of Commonwealth
Act No. 146, as amended, is hereby
amended to read as follows:

‘Any person who shall knowingly and
willfully perform, commit, or do, or
participate in performing, committing, or
doing, or who shall knowingly and
willfully cause, participate, or join with
others in causing any public service
corporation or company to do, perform or
commit, or who shall advise, solicit,
persuade, or knowingly and willfully
instruct, direct, or order any officer,
agent, or employee of any public service
corporation or company to perform,
commit, or do any act or thing forbidden
or prohibited by this Act, shall be
punished by a fine not exceeding
~~[twenty-five thousand pesos]~~ **TWO
MILLION PESOS (P2,000,000.00)**, or
imprisonment ~~[not exceeding five years]~~
**OF NOT LOWER THAN SIX (6) YEARS
AND NOT HIGHER THAN TWELVE (12)
YEARS**, or both, in the discretion of the
court ~~[: Provided, however, that for
operating a private passenger
automobile as a public service without
having a certificate of public convenience
for the same the offender shall be subject
to the penalties provided for in 10
section sixty-seven (j) of Act numbered
thirty-nine hundred an ninety-1 two].”~~

“Sec. 12. Section 25 of Commonwealth
Act No. 146, as amended, is hereby
amended to read as follows:

‘Any person who shall knowingly and
willfully neglect, fail, or omit to do or
perform, or who shall knowingly and
willfully cause or join or participate with
others in causing any public service
corporation or company to neglect, fail or
omit to do or perform, or who shall
advise, solicit, or persuade, or knowingly

<p>and willfully instruct, direct, or order any officer, agent, or employee of any public service corporation or company to neglect, fail, or omit to do any act or thing required to be done by this Act, shall be published by a fine not exceeding [twenty-five thousand pesos] TWO MILLION PESOS (P2,000,000.00), or imprisonment [not exceeding two years] OF NOT LOWER THAN SIX (6) YEARS AND NOT HIGHER THAN TWELVE (12) YEARS, or both, in the discretion of the court.”</p> <p>“Sec. 13. Section 26 of Commonwealth Act No. 146, as amended, is hereby amended to read as follows:</p> <p>‘Any person who shall destroy, injure, or interfere with any apparatus or appliance owned or operated by the [Commission] ADMINISTRATIVE AGENCIES or its agents, shall be [deemed guilty of a misdemeanor and upon conviction shall be] punished by a fine OF THE AMOUNT EQUIVALENT TO THE ACTUAL MARKET VALUE OF THE APPARATUS OR APPLIANCE DESTROYED OR INJURED PLUS A FINE NOT EXCEEDING TWO MILLION PESOS (PHP2,000,000.00) [not exceeding one thousand pesos] or imprisonment [not exceeding six months] OF NOT LOWER THAN SIX (6) YEARS AND NOT HIGHER THAN TWELVE (12) YEARS, or both in the discretion of the court.</p> <p>[Any public service permitting the destruction, injury to, or 30 interference with, any such apparatus or appliances shall forfeit a sum 31 not exceeding four thousand pesos for each offense.]’”</p>	
<p>“Sec. 14. Review of Foreign Direct Investment in Covered Transactions. –</p> <p>(a) National Security Reviews, How Initiated. – The President or the National Security Council (“Council”) shall initiate a review of a covered transaction to determine its effects on the</p>	<ul style="list-style-type: none"> • While we support the proposed provision, we note that the review should be undertaken without causing undue delay on the implementation of the investments in these covered transactions in order to encourage foreign interest in the country. The proposed 30-day

<p>national security of the Republic of the Philippines if –</p> <p>(i) The covered transaction is a foreign government-controlled transaction; and</p> <p>(ii) The transaction would result in control of any critical infrastructure of or within the Republic of the Philippines.</p> <p>The authority of the Council to initiate a review may not be delegated to any person, other than the appropriate Undersecretary of the department of deputy head of the agency represented in the Council.</p> <p>Any party to a covered transaction may likewise initiate a review under this paragraph by submitting a written notice to the Chairperson of the Council.</p> <p>The President or the Council shall complete a review under this paragraph within thirty (30) days from the date the review is initiated.</p> <p>XXX”</p>	<p>period should be strictly implemented.</p>
<p>“Sec. 16. Reciprocity Clause. – Foreign nationals shall not be allowed to own more than 40 per centum of capital in public services engaged in the operation and management of critical infrastructure unless the country of such foreign national accords reciprocity to Philippine nationals as may be provided by foreign law, treaty or international agreement. Reciprocity may be satisfied by any form or arrangement of exchange that is beneficial to Filipinos, including according rights of similar value in other economic sectors, as may be determined by the Director-General of the National Economic and Development Authority.</p>	<ul style="list-style-type: none"> • While the DTI recognizes the intention of the proposal to set the limits on the employment of foreigners on the country’s public utility sectors as a means to prioritize competent Filipino nationals for employment in these sectors, we note that the entry of foreign nationals may contribute new skills, ideas, and connections that may facilitate the integration of local sectors into global networks of service providers. • The 10th Foreign Investment Negative List (FINL)¹² has trimmed down the list of

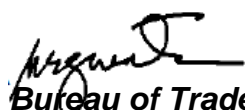
¹² Executive Order (EO) No. 184, s. 2015

Unless otherwise provided by law, or by any international agreement, a public service shall employ a foreign national only after the determination of nonavailability of a Philippine National who is competent, able and willing to perform the services for which the foreign national is desired; provided, that in no case shall the employed foreign nationals comprise more than twenty five percent (25%) of the total employees of the public service.

Any foreign national seeking admission to the Philippines for employment purposes and any public service which desires to engage a foreign national for employment in the Philippines must obtain an employment permit pursuant to Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended.”

professions reserved for Filipino professionals from 26 to five (5)¹³. The latest version, the 11th FINL¹⁴, further reduced the list to Radiologic and X-ray technology, Criminology, and marine deck officers and engine officers.

The Department reiterates its support for the passage of the proposed legislation, which will facilitate investments and increase competition, redounding to quality service delivery for the benefit of the Filipinos in general and the consumers in particular, taking into consideration our specific comments and recommendations.



Bureau of Trade and Industrial Policy Research
28 April 2021

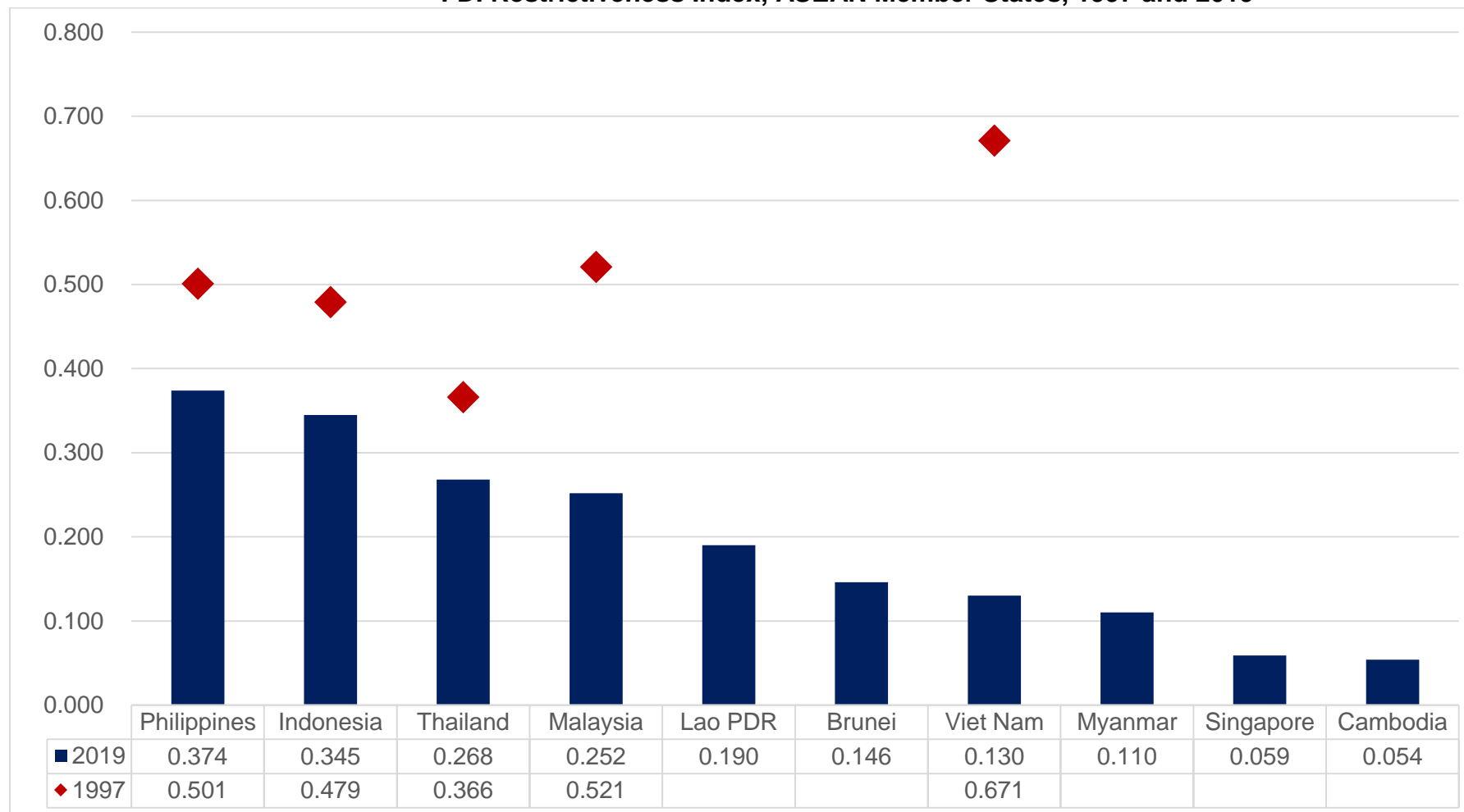
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¹³ These are in Pharmacy, Radiologic and X-ray technology, Criminology, Forestry, and Law

¹⁴ EO No. 65, s. 2018

ANNEX A

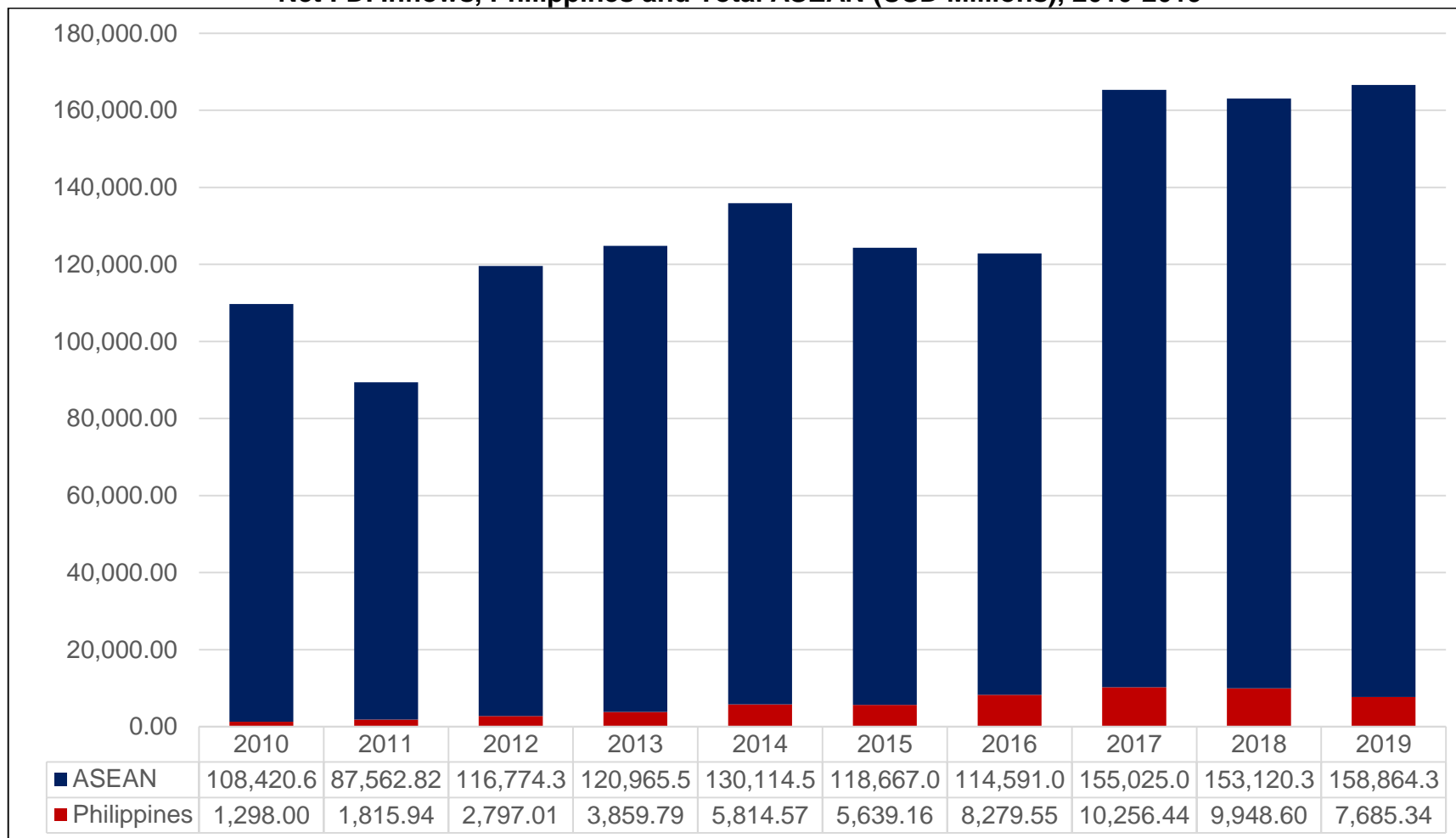
FDI Restrictiveness Index, ASEAN Member States, 1997 and 2019



Source: Organisation for Economic Co-operation and Development

ANNEX B

Net FDI Inflows, Philippines and Total ASEAN (USD Millions), 2010-2019



Source: ASEANstats

ANNEX C

JG Summit Holdings, Inc. vs. Court of Appeals, Committee on Privatization, its Chairman and Members; Asset Privatization Trust and Philyards Holdings, Inc, G.R. No. 124293

“A “public utility” is a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service.” To constitute a public utility, the facility must be necessary for the maintenance of life and occupation of the residents. However, the fact that a business offers services or goods that promote public good and serve the interest of the public does not automatically make it a public utility. Public use is not synonymous with public interest. As its name indicates, the term public utility implies public use and service to the public. The principal determinative characteristic of a “public utility” is that of service to or readiness to serve, an indefinite public or portion of the public as such which has a legal right to demand and receive its services or commodities. Stated otherwise, the owner or person in control of a public utility must have devoted it to such use that the public generally or that part of the public which has been served and has accepted the service, has the right to demand that use or service so long as it is continued, with reasonable efficiency and under proper charges. Unlike a private enterprise which independently determines whom it will serve, a “public utility” holds out generally and may not refuse legitimate demand for service. Thus, in Iloilo Ice and Cold Storage Co. vs. Public Utility Board, this Court defined “public use”, viz:

*“Public use” means the same as “use by the public”. The essential feature of the public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. In determining whether a use is public, we must look not only to the character of the business to be done, but also to the proposed mode of doing it. If the use is merely optional with the owners, or the public benefit is merely incidental, it is not a public use, authorizing the exercise of jurisdiction of the public utility commission. There must be, in general, a right which the law compels the owner to give to the general public. It is not enough that the general prosperity of the public is promoted. Public use is not synonymous with public interest. **The true criterion by which to judge the character of the use is whether the public may enjoy it by right or only by permission.**”*

XXX

*While the business may be regulated for public good, the regulation cannot justify the classification of a purely private enterprise as a public utility. **The legislature cannot, by its mere***

declaration, make something a public utility which is not in fact such; and a private business operated under private contracts with selected customers and not devoted to public use cannot, by legislative fiat or by order of a public service commission, be declared a public utility, since that would be taking private property for public use without just compensation, which cannot be done consistently with the due process clause.”

Corollarily, a Separate Opinion¹⁵ in the same case provides an insightful discussion on the difference between “public utility” and “public service”, to wit:

“A public utility requires a franchise, aside from a certificate of public necessity and convenience, for its operation, while a public service which is not a public utility requires only a certificate of public convenience”

XXX

A legislative declaration such as the definition by enumeration in the Public Service Act does not ipso facto render a business or service a public utility. For, as this Court held in North Negros Sugar Co. v. Hidalgo, whether or not one is a public utility is a matter of judicial, not legislative determination.

**** * * Whether or not a given business, industry, or service is a public utility does not depend upon legislative definition, but upon the nature of the business or service rendered, and an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal constitution, void whenever it interferes with private rights of property or contract. So a legislature cannot by mere fiat or regulatory order convert a private business or enterprise into a public utility, and the question whether or not a particular company or service is a public utility is a judicial one, and must be determined as such by a court of competent jurisdiction.”***

¹⁵ Ibid